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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEWMONT MINING CORPORATION,

Plaintiff,

v.

17 Cv. 8065 (RA)

ANGLOGOLD ASHANTI LIMITED,
et al.,

Defendants.

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November 14, 2018
4:00 p.m.

Before:

HON. JAMES L. COTT,

Magistrate Judge

APPEARANCES

BALLARD SPAHR LLP
Attorneys for Plaintiff
BY: GREGORY P. SZEWCZYK

CRAVATH, SWAINE & MOORE
Attorneys for Defendants
BY: LAUREN A. MOSKOWITZ

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1 (In chambers; phone conference)

2 THE COURT: Good afternoon. This is Judge Cott.

3 Could you please state your name for the record for
4 the court reporter.

5 MR. SZEWCZYK: Greg Szewczyk, with Ballard Spahr, on
6 behalf of plaintiff, Newmont Mining Corporation. Also in my
7 office with me is Nancy Lipson, who is in-house counsel for
8 Newmont Mining.

9 MS. MOSKOWITZ: Good afternoon, your Honor. This is
10 Lauren Moskowitz, from Cravath, Swaine & Moore, on behalf of
11 defendants.

12 THE COURT: Good afternoon to all of you.

13 I think just to try and dispense with something
14 straightforward, with respect to the motion to seal the Exhibit
15 D issue, I have reviewed all of that, and it seems to me that
16 the defendants' proposed redactions to Exhibit D seem
17 appropriate at this moment in time, without prejudice to them
18 being unredacted in further submissions if there is a basis to
19 do so, but the redactions seem relatively modest and related to
20 matters at least not at the heart of things at the moment. So
21 as to that, I would just ask that the plaintiff refile with the
22 redacted version of Exhibit D that the defendants have
23 submitted to the Court. That seems like a straightforward
24 matter.

25 Does that raise any concerns for anybody?

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1 MR. SZEWCZYK: No concerns for Newmont, your Honor,
2 and we will certainly refile with the redacted version.

3 THE COURT: The next thing I wanted to ask, trying to
4 deal with what I will call low-hanging fruit, potentially,
5 before we get to the nub of the matter, is I know there was an
6 application for the issuance of letters rogatory that
7 defendants filed last week.

8 Do the plaintiffs have any opposition to that for any
9 reason? I have seen nothing filed, but I just wanted to
10 confirm that there was none.

11 MR. SZEWCZYK: Your Honor, I have not personally been
12 dealing with that. I believe that Newmont does plan to file a
13 short opposition, but I can't say with 100 percent certainty.
14 If we will, would you like us to file by a date certain?

15 THE COURT: How about Friday?

16 MR. SZEWCZYK: That should not be a problem, your
17 Honor.

18 THE COURT: Do you know what the nature of the
19 objection would be to it?

20 MR. SZEWCZYK: I believe that it would have to deal
21 with the presumptive deposition limits, or the deposition
22 limits that we have already agreed to and the fact that we are
23 past those. But again, I have not been personally involved in
24 that so I don't want to say anything definitively just yet.

25 THE COURT: OK. I am just trying to obviate the need

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1 for a further conference, but perhaps it's something I will be
2 able to deal with without having another conference. We will
3 see what gets filed, and then depending on what gets filed, we
4 will figure out whether we need to have another conference or
5 whether I can resolve it on the papers.

6 I gather when you say the presumptive number of
7 depositions, meaning each said has agreed to and/or has already
8 taken ten fact depositions, is that what you mean by that?

9 MR. SZEWCZYK: That's correct, your Honor. I also
10 believe that Mr. Leland, who filed the application, and Ms.
11 Wallace from my office are planning to confer on Friday. So
12 this may be something that resolves itself. I am just not sure
13 yet.

14 THE COURT: Well, I guess what would be helpful to me
15 is either file whatever opposition there is going to be or file
16 a letter indicating that there is no opposition by Friday.

17 MR. SZEWCZYK: All right, your Honor. We absolutely
18 will.

19 Ms. Moskowitz, I assume that this application was
20 served on the nonparty?

21 MS. MOSKOWITZ: Your Honor, I am not aware of the
22 facts on that. Cravath is unable to be adverse to the
23 counterparty there and Mr. Leland is handling that so I am not
24 familiar with the status. I apologize. I am happy to ask Mr.
25 Leland that and we can get back to your Honor promptly on that

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1 in whatever manner you prefer.

2 THE COURT: Well, I just want to make sure that if
3 there is no objection from the plaintiff, there isn't some
4 potentially separate issue that's going to be interposed here
5 with respect to the subject of the letters rogatory. That's
6 all. And this was submitted, I guess, last Thursday. So I
7 don't know how much time, if they were going to interpose
8 something, they thought they would have to do so. Obviously
9 nothing has been submitted. It would be helpful if you could
10 have your colleague advise the Court by the end of the week
11 whether they know of any objection that's going to be
12 interposed by the nonparty.

13 MS. MOSKOWITZ: I will do so, your Honor.

14 THE COURT: So with those preliminaries out of the
15 way, why don't we then I guess take up the application that the
16 plaintiff has made.

17 So, Mr. Szewczyk, my threshold question is a timing
18 one, which is, at least from the record in front of the Court,
19 it appears that you all have had this information and the
20 redactions that the defendants have interposed for a long
21 period of time, months now. Why was there such a delay in
22 bringing this to the Court's attention when it, I think, sort
23 of postdates some depositions that would, I gather, have to be
24 reopened in the best-case scenario for you? Why wasn't this
25 something brought to the Court's attention sooner?

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1 MR. SZEWCZYK: Your Honor, to answer that, it really
2 goes to the redacted notes of Mr. Chancellor, who we were not
3 sure, based on the redactions and the information we had,
4 exactly who was present at that meeting. So it wasn't until
5 Mr. Chancellor's deposition that we learned that the other
6 attendees at that meeting included individuals who were
7 full-time CC&V operators, always located at the CC&V site. And
8 since we knew that we might need to move on that, depending on
9 the nature of Mr. Chancellor's testimony, we didn't want to
10 raise the earlier issue, the issues related to the two CC&V
11 attorneys as we defined them, so that we can put everything
12 before the Court at one time.

13 THE COURT: All right. Moving to the merits then, why
14 are you referring to Ms. Martelon and Mr. Christensen as CC&V
15 attorneys? It doesn't seem to me that that's a fair
16 characterization based on the record before the Court.

17 MR. SZEWCZYK: Your Honor, from the evidence that we
18 have seen, both from the testimony and the documents, although
19 there has been some characterizations of them as doing various
20 services on behalf of AGA North America, everything we have
21 seen has been working to help CC&V comply with various
22 different tasks; from everything we have seen, it just appears
23 that they were working full time on behalf of CC&V to the point
24 where Mr. Christensen was paid severance when he was no longer
25 retained afterwards.

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1 So from our perspective, especially given the nature
2 of the entries that we pointed to, it looks like, at least with
3 respect to those entries, they had to have been working to some
4 extent on behalf of CC&V, your Honor.

5 THE COURT: Well, my understanding is that anything
6 where these attorneys acted on behalf of or in the interest of
7 CC&V or AGA Colorado has been produced, or would be produced.
8 And the distinction, as I understand it, that the defendants
9 are making is that, where these attorneys worked on a matter
10 for AGA that related to AGA Colorado or CC&V, then they weren't
11 producing it, and that's the distinction they are making. And
12 why isn't that a legitimate distinction to make here?

13 MR. SZEWCZYK: Your Honor, we actually agree on that
14 distinction. I think the difference of opinion is to whether
15 or not they were acting entirely on behalf of AngloGold North
16 America in these specific entries. We did not challenge every
17 single entry that involved Mr. Christensen or Ms. Martelon
18 Evans. We only selected ones where, based on the nature of the
19 description, it seemed like, at least to some extent, they were
20 necessarily acting on behalf of CC&V or AGA Colorado.

21 Specifically, with respect to the litigations, based
22 on the descriptions in the privilege log, these appear to be
23 talking about litigations where the only defendants or parties
24 were CC&V and AngloGold Colorado. And so based on those
25 descriptions, to us it seems, at least to some extent, it's

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1 very likely that they were acting on behalf of those
2 subsidiaries as opposed to the parent companies, your Honor.

3 THE COURT: What is it in the privilege log
4 descriptions that gives you that impression? Because I don't
5 quite follow that, but it may just be that I am not
6 understanding.

7 MR. SZEWCZYK: With respect to the litigation
8 specifically, there was no parent company who was a party to
9 any of those litigations. And so when the descriptions talk
10 about draft summaries of litigation costs, or other specific
11 matters relating to the litigation, to Newmont that indicates
12 that at least to some degree they were acting on behalf of the
13 parties to that litigation, and, therefore, that would be a
14 privilege that would be owned, at least in part, by CC&V or AGA
15 Colorado, your Honor.

16 THE COURT: Ms. Moskowitz, can you speak to that issue
17 a little bit for me?

18 MS. MOSKOWITZ: Yes, I can. Thank you, your Honor.

19 The fact that a parent was not a party to the
20 litigation does not mean that the advice to the parent and
21 parent company was not provided related to those litigations.
22 So at least one document I have in front of me is advice to the
23 parent about the litigation and not advice to CC&V about the
24 litigation.

25 THE COURT: Well, is this a question a little bit of

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1 the description in the privilege log perhaps not being as
2 comprehensive as it could be in order for the plaintiff to
3 understand that?

4 MS. MOSKOWITZ: I don't think so, your Honor. Because
5 the one example I just gave, which is AGA PRIV 3595, which is
6 on page 3 from the bottom of our Exhibit A, says "privileged
7 communication and attachment with inside counsel providing
8 legal advice regarding draft AGA executive management report
9 concerning Mill construction status." So I think it's pretty
10 clear that that is advice in connection with the parent
11 executive management level. So I don't think it's vague.

12 THE COURT: I mean, I don't really know at the end of
13 the day the best result here. I think that you all agree to
14 the general overarching principle that I would be guided by
15 here, which is that, as I said, and Mr. Szewczyk you agreed
16 with this, that where these attorneys were acting on behalf of
17 or in the interest of AGA Colorado and CC&V they should be
18 produced, and I think indeed there has been production along
19 those lines, but where they worked on matters for AGA that
20 related to AGA Colorado or CC&V they need not be produced. And
21 the question is you're questioning whether what is in the
22 privilege log falls into category B as opposed to category A,
23 if you will.

24 I suppose I could look at these documents, but I am
25 not sure I am well versed enough to be able to totally make

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1 that judgment unless the documents to some extent speak for
2 themselves. It may be that there is a certain amount of
3 context that's required to really understand that that goes
4 beyond. I mean, my guiding principle would be that anything
5 that the defendants have in which these attorneys acted on
6 behalf of AGA Colorado or CC&V should be produced.

7 My understanding is they have done that. Is that not
8 right, Ms. Moskowitz?

9 MS. MOSKOWITZ: That is correct, your Honor. That
10 certainly was our endeavor and the examples that were given to
11 your Honor in the motion we confirmed were not of that ilk.

12 THE COURT: So, Mr. Szewczyk, if you want me to do an
13 in camera review of these 56, I can do it. I don't know how
14 meaningfully that will be, frankly, because it seems to me this
15 is a somewhat nuanced set of documents related to very
16 fact-specific relationships that I think the Court would be
17 hard-pressed to really be able to assess. But if you think
18 there is some possibility I can review these -- I mean, I might
19 have to review them and then have an ex parte conversation with
20 Ms. Moskowitz about some of them related to particular
21 individuals or questions that I might have. I can envision
22 that. I don't know. What do you all think?

23 MR. SZEWCZYK: Your Honor, we certainly don't want to
24 put you through the exercise of going through dozens of
25 documents if there is going to be nuances that you may not have

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1 enough background to appreciate, and I agree with you that
2 there are probably going to be some documents of that ilk.

3 I guess the only other point that may be worth
4 bringing up is Ms. Moskowitz pointed to one of these documents
5 that was listed as the CC&V operations versus the litigation.
6 I think so far we have been focusing on the litigation. There
7 may be some legal issues to consider with respect to both the
8 ones that have been labeled as diligence and also operations.
9 Again, this is based on our review of the privilege log's
10 descriptions, and we obviously don't have the benefit of seeing
11 the documents. But we think under some of the guidance from
12 cases such as *Teleglobe*, and then *Bass Public* and *Polycast*, all
13 of which were cited in the motions, there are situations where,
14 even if it is a parent company's disclosure obligation, if they
15 are seeking information from the various subsidiaries in order
16 to complete the necessary filings or disclosure, it forms a
17 joint representation with respect to making that disclosure or
18 filing. So we think some of these entries demonstrate that
19 there could be a joint representation in such situations.

20 Then just the one further point to add on that is, all
21 of the AngloGold parties, including AngloGold Colorado, had at
22 least some obligations under the purchase agreement to make
23 sure that all matters were complied with in material respects
24 and all covenants required by the agreements were performed.
25 So even if it is an AngloGold North America disclosure being

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1 discussed, AngloGold Colorado also still had a contractual
2 interest in making sure that all representations, warranties
3 and disclosures were complete and accurate. So there may be
4 somewhat more of a legal decision you can make on that point,
5 your Honor.

6 THE COURT: Well, my concern is the following, which
7 defendants raised in their letter, which is I think what you're
8 suggesting would require a pretty expansive interpretation of
9 what the privilege agreement that you all entered into means.
10 I mean, when I look at it, and I look at paragraph 2(e), which
11 is what you're citing in your letter, it says that the parties
12 agree that the following principles apply to privileged
13 communications that occurred prior to Newmont's acquisition.
14 And the documents we are talking about now fall into this
15 category, correct?

16 MR. SZEWCZYK: Yes, they do.

17 THE COURT: So this says, for preacquisition
18 communications made, for the purpose of obtaining or providing
19 legal assistance to more than one entity, the privilege is held
20 and can be waived by each such entity.

21 What is the evidence in the privilege logs to suggest
22 that these communications were made for the purpose of
23 obtaining or providing legal assistance to more than one
24 entity?

25 MR. SZEWCZYK: Your Honor, I think the answer to that

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1 is, to extent it is relating to disclosures that are required
2 under the purchase agreement or otherwise, all of the AngloGold
3 parties, including AngloGold Colorado, which is now a Newmont
4 company, had a contractual interest in ensuring that those
5 disclosures were correct and accurate.

6 And so if the sellers wished to obtain separate
7 counsel for the entity they were selling, or to designate
8 certain attorneys and wall them off when they needed to, that
9 was their prerogative. But because they didn't, all of the
10 attorneys were, therefore, representing all of the AngloGold
11 parties at that time, which included AngloGold Colorado, and
12 were therefore providing legal advice for AngloGold Colorado.

13 THE COURT: Well, Ms. Moskowitz says in her letter
14 that these 56 entries all involve communications -- and I am
15 quoting -- "relating to AGA's own separate legal interests."
16 And if that's true, then I don't see how you can prevail on
17 these arguments. I think what you are arguing is that there is
18 some blurring between AGA's own separate legal interest and the
19 other AGA's interest, some of which are now your client's
20 companies. That's what you're arguing. But if in fact these
21 documents all do reflect communications relating to AGA's
22 separate legal interests, then I don't see how you overcome the
23 privilege invocation.

24 MR. SZEWCZYK: I think you have the issue right. It's
25 a question of whether or not the legal interests are blurred,

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1 in part based on the contractual obligations that are
2 attributed to AGA parties generally as opposed to just AGA
3 North America.

4 THE COURT: How can a court make a determination as to
5 whether some e-mail or the equivalent involves a communication
6 that wouldn't relate simply to AGA's interest but related to
7 AGA's interest as well as an AGA's subsidiary's interest? How
8 does a court make that distinction? I don't know how to do
9 that.

10 MR. SZEWCZYK: Your Honor, I think our position on
11 that is that in this case, with respect to the specific
12 language under the stock purchase agreement, and I am looking
13 at section 7.02(c), the contract itself created obligations by
14 all AGA parties, including AngloGold Colorado, to ensure that
15 all obligations and covenants have been met. So in this case,
16 if it relates to a disclosure under the stock purchase
17 agreement by any AngloGold entity, all of the AngloGold
18 entities had an interest in ensuring that that was accurate and
19 correct.

20 THE COURT: So any advice any in-house counsel for AGA
21 may have given AGA would, by definition, redound to the
22 benefit, if I can phrase it that way, to the AGA subsidiaries
23 as well?

24 MR. SZEWCZYK: Your Honor, at least with respect to
25 the covenants and obligations that are referred to in that one

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1 provision which puts that onus on all of the AGA parties.

2 THE COURT: Can I ask, were Mr. Christensen and Ms.
3 Martelon already deposed?

4 MR. SZEWCZYK: No, your Honor, they have not been
5 deposed.

6 THE COURT: Are you planning to depose them?

7 MR. SZEWCZYK: At this time their depositions have not
8 been noticed.

9 THE COURT: I am trying to get a sense of how
10 significant this all is in the grand scheme of things.
11 Obviously everything is significant on some level or you
12 wouldn't seek relief from a court if it wasn't significant, but
13 why is this something that is so important to your client that
14 we are focusing on it in this fashion? What light will it shed
15 here beyond what the vast record already provides to the
16 parties?

17 MR. SZEWCZYK: Your Honor, with respect to Mr.
18 Christensen and Ms. Martelon Evans, a lot of the documents
19 focused in on what was known and what was going on in the
20 underlying litigation, as I will call it, which was claims
21 against a contractor named FLS. And a key part of Newmont's
22 claims is that during this time frame when these communications
23 are going on, especially in the July of 2015 time frame,
24 AngloGold became aware of several defects and did not disclose
25 those to Newmont before the closing, as they were obligated to

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1 do. And so based on the timing and topics in the descriptions
2 that are listed here, these documents could go to some of the
3 key aspects of the case, your Honor.

4 THE COURT: But if these lawyers were talking with
5 each other and their AGA clients, why would that ever be
6 something that wouldn't be privileged?

7 We are back to the discussion we were having a few
8 moments ago I guess.

9 MR. SZEWCZYK: Your Honor, I think it goes back to the
10 blurred lines. With respect to the litigation discussions with
11 outside counsel that represented CC&V and AngloGold Colorado,
12 discussions with the outside counsel for those subsidiaries,
13 there would be some sort of blurred lines even if there was
14 some sort of independent privilege or interest of the parent
15 companies. And the same thing goes with respect to the
16 disclosures, because of AngloGold Colorado's independent
17 interest and obligations under the stock purchase agreement,
18 those lines get blurred again.

19 THE COURT: Ms. Moskowitz, do you want to be further
20 heard on this subject?

21 Ms. Moskowitz, are you there?

22 MS. MOSKOWITZ: I am. I'm sorry. I didn't hear your
23 Honor. I might have cut out.

24 THE COURT: My question was, I have been talking with
25 your colleague on the other side about this, but I wanted to

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1 ask if you wanted to be heard.

2 MS. MOSKOWITZ: There has been a lot, your Honor. On
3 the last point of discussion, I think that this blurred line
4 argument winds up blowing the rule for all the reasons we have
5 said in our letter. The idea that AGA couldn't get advice
6 about this litigation simply because the litigation involves
7 the asset that ultimately was sold is on the category B, I
8 think is the category your Honor had for AGA's interest being
9 advised on and not a joint representation with the subsidiary
10 that ultimately was sold.

11 And just one other point just so that I don't let it
12 go unsaid. The stock purchase agreement, the representations
13 and warranties made in that are not made by the AGA Colorado
14 entity. The paragraph that was read by Newmont's counsel is
15 simply a reference to all the parties have to perform all the
16 things that the contract tells those parties to do. It's the
17 standard performance of obligation provision. And the reps and
18 warrants made and the obligations for those reps and warrants
19 are not made by AGA Colorado. So I don't think that argument
20 lends any credence to this blurring argument that's being made.
21 I think the line is clear. Everyone agrees with it. And just
22 because the subject matter of the advice might be the CC&V
23 asset that was sold does not mean that that creates a joint
24 representation for every single thing that AGA was advised
25 about CC&V from its lawyers.

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1 THE COURT: I guess where I come out, and I have spent
2 frankly the better part of today trying to puzzle through this
3 because I think it's quite complicated on some level, but I
4 think where I come out at the moment is essentially where I
5 started, which is that my view is that anything where these
6 attorneys acted on behalf of or in the interest of AGA Colorado
7 or CC&V should be produced, and anything where the attorneys
8 worked on a matter for AGA that related to these subsidiaries
9 should not be produced, at least without more.

10 And my view is that otherwise I think the privilege
11 gets swallowed up unnecessarily and improperly, because then
12 you would have what I think the defendants characterized as an
13 overly expansive interpretation of the joint privilege here,
14 and it would mean that any time a parent sells one of its
15 subsidiaries, it in some way is giving up its right to be the
16 recipient of legal advice from lawyers without that advice
17 being privileged, and I don't think that can be right. And
18 that, it seems to me, cuts to sort of the heart of where these
19 issues are.

20 So I think, at least on the record as it's presented
21 and on my best reading of the privilege log as it's been
22 presented, I am not prepared to compel the defendants to
23 produce more than they have. But I want to be very clear that
24 they have to be guided by the principle that, if these
25 individuals acted on behalf of the subsidiaries, any documents,

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1 including any that may be on this log, should be re-reviewed
2 and produced if they really properly fall into that category.

3 And I think, Ms. Moskowitz, in light of our
4 conference, I would direct you and your colleagues to review a
5 further time these 56 items and verify that they all fall into
6 the category of -- and you will represent in writing to your
7 adversary on further review -- that they all fall into the
8 category, what we have called category B, where they may be
9 related to but they are not on-behalf-of-type documents, if I
10 can use that shorthand.

11 MS. MOSKOWITZ: We will do so, your Honor.

12 THE COURT: I think that's how I am going to leave
13 that issue for today, mindful that I think it's a complex issue
14 and I think it's a difficult issue to frankly develop the
15 record further than it is, through no fault of the plaintiffs.
16 But I do think to some extent the plaintiff is, and this sounds
17 more pejorative than I mean it, but speculating to some extent,
18 as you have to when you review a privilege log, as to what a
19 document may entail, and I am just not satisfied that there is
20 a sufficient basis in the record for me to direct that these
21 documents be compelled.

22 Why don't we talk about Exhibit B, and I gather we are
23 really talking about three particular documents now, is that
24 right, or am I misunderstanding?

25 MR. SZEWCZYK: I think that's correct, your Honor.

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1 THE COURT: So one of them it seems to me isn't very
2 hard to understand, but the other two I think raise more
3 questions for me. Let me just get my papers related to that in
4 front of me.

5 So the first one, which has been Bates stamped 706104,
6 which is Docket No. 73-2 at page 16 of the ECF numbering, this
7 appears to be an e-mail from Mr. Chancellor to Mr. Christensen
8 and Ms. Martelon, all of whom are AGA in-house counsel. So
9 why, Mr. Szewczyk, would that be something not privileged?

10 MR. SZEWCZYK: Your Honor, I think it gets back to the
11 discussion we just had relating to the blurred lines, but I am
12 not sure that there is a lot more to be said above and beyond
13 what we have already just discussed.

14 THE COURT: OK. That one strikes me not a hard call,
15 at least relative to what we have discussed, and I think that
16 should be privileged.

17 The other two raise more questions for me. Why don't
18 we look at what has been Bates stamped 737992.

19 So these are e-mails -- well, why don't you tell me
20 what these are rather than my sort of postulating what they
21 are.

22 Ms. Moskowitz, why don't you tell me what this is, who
23 these people are, and why this is privileged.

24 I mean, this is the one that says, "I don't want to
25 send hares racing so let's keep it low key." That is sort of

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1 provocative. I don't know what this really entails this
2 correspondence here.

3 MS. MOSKOWITZ: The portion that we redacted, as
4 indicated in the privilege log, and I am pulling it up right
5 now, but the portion that we redacted related to a request for
6 legal advice from outside counsel by AGA employees and inside
7 counsel about a potential joint venture structure for the
8 potential sale of CC&V.

9 THE COURT: Who are the lawyers on these e-mails to
10 whom this request is being made?

11 MS. MOSKOWITZ: Ms. R. Sanz is Ms. Ria Sanz, who is
12 the general counsel of AGA. And there is an outside counsel
13 Honigman, who is the outside counsel from whom that was
14 directed.

15 THE COURT: I don't see them on this document. I see
16 the e-mail from Chris Coetzee to Paul Dennison, copying Paris
17 Aposporis and Warren Gordon Dingwall, and then a response with
18 those same parties. I don't see the names you just mentioned.

19 MS. MOSKOWITZ: One moment, your Honor, if you would.
20 The text of the e-mail is referencing the request.
21 It's not in the CC line. It's a reference to a request that
22 would be made.

23 THE COURT: So it's a request from AGA personnel for
24 legal advice to a lawyer?

25 MS. MOSKOWITZ: Yes. I believe it's reflecting that

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1 legal advice would be sought from that outside counsel as
2 opposed to it being the exact transmission of that request for
3 advice.

4 THE COURT: I am not sure, Mr. Szewczyk, this is going
5 to rock your world one way or the other frankly. But if that's
6 what it is, then it seems to me probably properly redacted. Do
7 you want to argue otherwise?

8 MR. SZEWCZYK: Your Honor, I think I agree that it
9 probably doesn't rock our world one way or the other. I think
10 by the nature of the document it seems like it may be a bit
11 aggressive to have this level of redaction if all of this could
12 be questions or reflecting legal advice from Ms. Sanz just
13 based on the subject of the e-mail.

14 THE COURT: You may be right about that. On the other
15 hand, the amount of print that's been redacted is rather small.
16 So I am not even sure how illuminating, whatever it may be
17 beyond, we want to talk to you about this, or can you give me
18 advice about this, it's going to be even if it were unredacted.
19 So I think I am probably going to just leave this as it is.

20 The other one is 724252?

21 MS. MOSKOWITZ: Yes, your Honor. I am pulling that
22 one up as well. I believe it's a similar situation where it's
23 reflecting the legal advice of outside counsel, including the
24 Honigman folks, same as the last one, as well as Cravath, as
25 indicated in the privilege log entry. I am just pulling it up

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1 right now to see if I can give it any more color.

2 Yes, your Honor. I just confirmed it's saying, based
3 upon the discussion with Cravath and Honigman. I guess we
4 could have unredacted that one piece and then redacted the
5 rest, but I am representing that the beginning of what was
6 redacted says based upon the discussion with Cravath and
7 Honigman.

8 THE COURT: OK. Well, I mean, if that's in fact what
9 it is, then I am not going to overrule the redaction that's
10 been made there.

11 My law clerk is telling me this document is a
12 multipage document. So I don't have it all in front of me
13 here.

14 MS. MOSKOWITZ: Yes, your Honor. And it's all part of
15 the same discussion.

16 THE COURT: OK.

17 MS. MOSKOWITZ: It's a very long e-mail that
18 summarizes that advice.

19 THE COURT: Mr. Szewczyk, do you want to be heard
20 further?

21 MR. SZEWCZYK: Your Honor, the other pages that you
22 indicated that you don't have in front of you, it's multiple
23 pages fully redacted, and it is written by Mr. Dennison. So
24 unless it's verbatim reflecting everything that was from
25 Cravath and Honigman, it would seem like some of this should

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1 not be redacted, just based on the sheer volume of redaction
2 and otherwise the topic of the e-mail.

3 THE COURT: Ms. Moskowitz, you have the document in
4 front of you unredacted. Is the document such that it is
5 entirely a summary of legal advice provided by counsel, is that
6 literally what it is?

7 MS. MOSKOWITZ: My reading of this, sitting here right
8 now, is that it is a very extensive chart with questions, and
9 then the answers were filled in based on that discussion. So
10 that is my reading of this, is that it is a lengthy summary of
11 lawyers' answers to various questions in connection with the
12 deal, yes.

13 THE COURT: Mr. Szewczyk, I take your point, and I
14 think there has been what it seems to me like very aggressive
15 redactions in this case, but at least as Ms. Moskowitz just
16 described that last document to me, I am not prepared to
17 overrule the redactions that have been made if it is exactly as
18 described, and as an officer of the court I will accept her
19 representation to that effect.

20 So what else, if anything, is there with respect to
21 Exhibit B that we need to discuss further?

22 MR. SZEWCZYK: Your Honor, I think the only issue, to
23 the extent it would be separate from before, would be the notes
24 of Mr. Chancellor when he was at the meeting with the CC&V
25 operators discussing problems with the CC&V Mill, and

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1 potentially about the CC&V litigation. Because I know while
2 there are blurred lines and it can be difficult, it seems at
3 least in that instance there would have to be some joint
4 privilege, whereas Mr. Chancellor would be acting at least in
5 part on behalf of CC&V or AngloGold Colorado in that context of
6 a discussion.

7 THE COURT: Ms. Moskowitz, that sounds right to me.
8 Why is that not correct?

9 MS. MOSKOWITZ: Your Honor, I apologize. Are we
10 talking about the notes?

11 THE COURT: Yes.

12 MS. MOSKOWITZ: Your Honor, I don't see any difference
13 between the situation and the other lines that have been drawn
14 with respect to e-mails reflecting legal advice. The
15 individuals who were taking the notes in this context were
16 acting on behalf of AGA and not on behalf of CC&V. And simply
17 because either a CC&V employee was present or Newmont was
18 present certainly doesn't make their notes part of a joint
19 privilege that was being held, and the idea that AGA couldn't
20 be represented separately from what was going on in that
21 litigation I don't think follows from the fact that they took
22 notes from those meetings, any more than me taking notes from a
23 meet and confer with Newmont would entitle them to my notes.

24 THE COURT: And that's the analogy you're drawing
25 here, that what Mr. Christensen was doing in the notes he was

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1 making were to serve the interest of AGA and not CC&V?

2 MS. MOSKOWITZ: Correct.

3 THE COURT: But technically the notes might well have
4 also served the interest of CC&V, no?

5 MS. MOSKOWITZ: Certainly, hypothetically, yes, and I
6 think we did in fact produce unredacted versions of notes when
7 that applied, similar to the line we drew on the e-mail
8 correspondence, so that when that was true they got them, and
9 when it wasn't true we didn't produce them. So I think we
10 attempted to apply the same principle to the handwritten notes
11 as we did to the other types of documents in the case.

12 THE COURT: All right. Well, I think for consistency
13 sake, if nothing else, I think I will stand by my prior
14 rulings, and the principles underlying them as discussed, and
15 apply that to the notes we are talking about now and not
16 require their production either for the same reasons.

17 I guess put another way, if I am wrong, I am wrong all
18 the way around in that regard. But I think the line drawing
19 that was made is something that seems, to my way of thinking,
20 consistent with my understanding of the law as it would apply
21 to the facts in this relatively sophisticated complex context
22 here.

23 Anything else from counsel that we need to address on
24 this call?

25 MR. SZEWCZYK: Nothing else from plaintiff.

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1 MS. MOSKOWITZ: Nothing from defendants, your Honor.
2 Thank you.

3 THE COURT: OK. I want to keep you all on the line
4 for a minute, but I am going to go off the record and tell the
5 court reporter that she doesn't need to stay. I just want to
6 talk to you all about something else. So I am going to excuse
7 the court reporter with your permission. OK?

8 MS. MOSKOWITZ: Thank you, your Honor.

9 MR. SZEWCZYK: Thank you, your Honor.

10 (Adjourned)
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